



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R03-OAR-2013-0816; FRL-9928-23-Region 3]

**Approval and Promulgation of Air Quality Implementation Plans;
Delaware; Nonattainment New Source Review; Emission Offset Provisions**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to disapprove a State Implementation Plan (SIP) revision submitted by the Delaware Department of Natural Resources and Environmental Control (DNREC) for the State of Delaware on October 15, 2013. EPA is proposing this action because the submittal does not satisfy the requirements of Clean Air Act (CAA) or the Federal implementing regulations, which establish the criteria under which the owner or operator of a new or modified major stationary source must obtain the required emission offsets “from the same source or other sources in the same nonattainment area” with limited exceptions, for Delaware’s nonattainment New Source Review (NSR) preconstruction permitting program. In addition, EPA is proposing disapproval of the SIP revision because Delaware exercises authorities that are reserved for EPA under section 107 of the CAA. This action is being taken under the CAA.

DATES: Written comments must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA-R03-OAR-2013-

0816 by one of the following methods:

A. www.regulations.gov. Follow the on-line instructions for submitting comments.

B. E-mail: campbell.dave@epa.gov.

C. Mail: EPA-R03-OAR-2013-0816, David Campbell, Associate Director, Office of Permits and Air Toxics, 3AP10, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. Hand Delivery: At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA-R03-OAR-2013-0816. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at www.regulations.gov, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through www.regulations.gov or e-mail. The www.regulations.gov website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through www.regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA

cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the www.regulations.gov index.

Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form.

Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Delaware Department of Natural Resources and Environmental Control, 89 Kings Highway, P.O. Box 1401, Dover, Delaware 19903.

FOR FURTHER INFORMATION CONTACT: Amy Johansen, (215)814-2156, or by e-mail at johansen.amy@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

A. CAA Sections 172(c)(5) and 173(c)(1)

Under section 172(c)(5) of the CAA, a SIP is required to include provisions which require permits for the construction and operation of new or modified major stationary sources anywhere in a nonattainment area in accordance with the requirements of section 173 of the CAA.¹

¹ A nonattainment area is the air quality control region designated by EPA under CAA section 107 as not attaining a particular National Ambient Air Quality Standard (NAAQS) for any of the six criteria air pollutants.

Section 173, in turn, sets forth a series of requirements for the issuance of permits for the owners or operators of new or modified major stationary sources within nonattainment areas.

Specifically, section 173 provides *inter alia* that construction and operating permits may only be issued if: (a) sufficient offsetting emission reductions have been obtained to reduce total emissions from existing sources and the proposed source to the point where reasonable further progress towards meeting the ambient air standards is maintained; and (b) the proposed source is required to comply with the lowest achievable emission rate (LAER).²

Relevant to Delaware's SIP revision, CAA section 173(c) spells out the offset requirements for the owners and operators of new or modified major stationary sources. Specifically, section 173(c)(1) requires "the owner or operator of a new or modified major source may comply with any offset requirement in effect under this part for increased emissions of any air pollutant *only* by obtaining emission reductions of such air pollutant from the same source or other sources in the *same nonattainment area*, except that the State may allow the owner or operator of a source to obtain such emission reductions in another nonattainment area *if* (A) the other area has *an equal or higher nonattainment classification* than the area in which the source is located and (B) emissions from such other area *contribute* to a violation of the national ambient air quality standard in the nonattainment area in which the source is located" (emphasis added).

B. 40 CFR 51.165 and Appendix S to Part 51, the Emission Offsets Interpretive Ruling

40 CFR 51.165 contains the SIP requirements for nonattainment NSR permit programs.

Pursuant to 40 CFR 51.165(a)(3)(ii)(F), SIPs must contain provisions relating to the permissible location of offsetting emissions which are at least as stringent as those set out in appendix S,

² See CAA section 171(3), 42 U.S.C. 7501(3) (defining LAER).

section IV.D. Appendix S sets forth EPA's interpretive ruling for preconstruction review requirements for stationary sources of air pollution under 40 CFR subpart I and section 129 of the CAA Amendments of 1977. Appendix S specifies that, "a major new source or major modification which would locate in any area designated under section 107(d) of the Act as attainment or unclassifiable for ozone that is located in an ozone transport region or which would locate in an area designated in 40 CFR part 81, subpart C, as nonattainment for a pollutant for which the source or modification would be major may be allowed to construct only if the stringent conditions... are met." The goal of this section is to ensure there is progress towards achievement of the National Ambient Air Quality Standard (NAAQS). Section IV.D of appendix S, "Location of Offsetting Emissions," proscribes the acceptable areas from which a new or modified source can obtain the required emissions offsets. The offsets must come from the same source or other sources in the same nonattainment area. However, the section provides that reviewing authorities may allow sources to obtain offsets from other nonattainment areas provided that two conditions are met: the nonattainment area from which the offsets are obtained must be of equal or higher nonattainment classification, and emissions from the area in which the offsets are obtained must contribute to a violation of the NAAQS in the area in which the source is located. These requirements are identical to the requirements in CAA section 173(c).

Delaware's SIP revision submittal, 7 DE Admin Code 1125 sections 2.5.5 and 2.5.6, which were revised by Delaware effective September 11, 2013, does not meet the requirements in CAA section 173(c), 40 CFR 51.165(a)(3)(ii)(F) and appendix S, section IV.D.1, because the identified sections allow emissions offsets to be used from areas not designated by EPA pursuant to CAA section 107 as an area of equal or higher nonattainment classification for any ozone

NAAQS and do not address contribution requirements in the CAA and its implementing regulations.

C. CAA Section 107

Under CAA section 107(c), the Administrator of the EPA is given the authority to designate as an air quality control region any interstate area or major intrastate area which she deems appropriate for the attainment and maintenance of ambient air quality standards. CAA section 107(d) provides the process for the Administrator of EPA, with recommendations from Governors, to designate areas or portions of areas within states as nonattainment, attainment, or unclassifiable upon promulgation or revision of a NAAQS.

Pursuant to section 107 of the CAA, New Castle and Sussex Counties, Delaware were designated by EPA for the 2008 8-hour ozone NAAQS as “marginal” nonattainment under 40 CFR part 81, while Kent County was designated as “unclassifiable/attainment.” *See* 77 FR 30088 (May 21, 2012). New Castle County is a portion of the Philadelphia-Wilmington-Atlantic City marginal nonattainment area (Philadelphia Area) for the 2008 8-Hour ozone NAAQS.

Upon designation, a nonattainment area for ozone is required to meet the plan submission requirements under section 182 of the CAA (in subpart 2 of Part D of Title I of the CAA) for each nonattainment area classification (marginal, moderate, serious, severe, and extreme) as well as the general SIP planning requirements in sections 172 and 173 of subpart 1 of Part D of Title I. The State of Delaware is unique because it is part of the Ozone Transport Region (OTR), as established in CAA section 184(a). Therefore, at a minimum, the entire State of Delaware is

required to meet the plan submission requirements for a moderate nonattainment area classification as specified in CAA sections 182(b) and 184(b). Moderate area classification plan requirements include the emissions offset provisions within section 173 of the CAA and within its implementing regulations.

D. Delaware's Approved 7 DE Admin. Code 1125 – Requirements for Preconstruction Review

For purposes of satisfying CAA sections 172 and 173, Delaware presently has a fully-approved nonattainment NSR preconstruction permitting program. *See* 77 FR 60053 (October 2, 2012). Typically, disapproval of a Part D NSR SIP revision would trigger sanctions under section 179 of the CAA and a requirement for EPA to impose a Federal Implementation Plan (FIP) in lieu of an approved SIP pursuant to section 110(c) of the CAA. However, in this case, Delaware's existing nonattainment NSR SIP is fully approved as meeting CAA requirements and there are no SIP deficiencies. Therefore, sanctions under CAA section 179 and FIP provisions under CAA section 110(c) are not triggered by the disapproval of this SIP revision. Delaware remains obligated to implement its Federally-approved nonattainment NSR preconstruction permitting program in accordance with CAA section 173.

II. Summary of SIP Revision and EPA Analysis

On October 15, 2013, DNREC submitted a proposed revision to Delaware's SIP to EPA for approval. The proposed revision is to 7 DE Admin. Code 1125, Requirements for Preconstruction Review, sections 2.5.5 and 2.5.6, Emission Offset Provisions.³ EPA has

³ DNREC's revised 7 DE Admin. Code 1125, section 2.5.5 and 2.5.6 became effective September 11, 2013.

reviewed Delaware's proposed SIP revision and determined that it does not comply with the requirements of CAA sections 172(c)(5) and 173(c)(1) or the Federal implementing regulations in 40 CFR 51.165 and part 51, appendix S, section IV.D for several reasons. In addition, in the proposed revisions to 7 DE Admin. Code 1125, sections 2.5.5 and 2.5.6, Delaware exercises authorities that are reserved solely for EPA in CAA section 107 by treating certain areas as ozone nonattainment areas regardless of EPA's classification of those states for attainment of the ozone NAAQS, and therefore EPA proposes to disapprove this SIP revision submittal as not in accordance with the CAA.

First, the revised regulation enables sources in Delaware seeking NSR permits to obtain emission offsets from sources located in other areas, including areas outside of the State of Delaware, irrespective of the area's nonattainment status as compared to Delaware's nonattainment status for the same NAAQS.⁴ CAA section 173 and its implementing regulations clearly require emission offsets for NSR permits to come from the same area where a source is located or from an area with the same or higher nonattainment classification as the area where a source is locating or located.

Second, the revised regulation also permits sources seeking NSR permits in Delaware to obtain emissions offsets from areas without a determination that the other areas "contribute to violation" of the NAAQS in Delaware where a source seeking a NSR permit would be located as

⁴ 7 DE Admin. Code 1125, section 2.5.5, as revised September 11, 2013, provides that *Delaware* may consider certain states as having the same nonattainment classifications as the area of Delaware where offsets are to be used including Connecticut, Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and Wisconsin. EPA notes that several of these states have no areas classified by EPA under CAA section 107 as nonattainment for the ozone NAAQS. In addition, several of the specified states are not part of the OTR established pursuant to CAA section 184 which would treat areas within those states as Moderate nonattainment of an ozone NAAQS.

required in CAA section 173 and its implementing regulations. The language in section 2.5.6 in 7 DE Admin. Code 1125 provides that sources can obtain emission offsets “in the nonattainment area which the source is located which shall specifically include any area in the States of Connecticut, Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and Wisconsin.”⁵

Finally, the revised regulation language allows Delaware to exercise authorities that are reserved solely for EPA in CAA section 107 by allowing “the Department” to determine the areas in which owners or operators can acquire emission offsets, regardless of the attainment status of the area. Specifically, Delaware is proposing language for the SIP that “the Department may consider any area in the following states as having the same nonattainment classification as the area of Delaware where the offsets are used: Connecticut, Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and Wisconsin.” *See* 7 DE Admin. Code 1125 section 2.5.5. As discussed in the Background Section of this proposal, under CAA section 107(c), only the Administrator of the EPA is given the authority to designate as an air quality control region any interstate area or major intrastate area which she deems appropriate for the attainment and maintenance of ambient air quality standards. The State of Delaware has no such authority under the CAA to designate areas for nonattainment with the NAAQS to meet requirements in CAA

⁵ Delaware’s October 15, 2013 SIP revision claims contribution from these specified states to ozone nonattainment or interference with maintenance of ozone NAAQS in Delaware is supported by EPA modeling conducted for the Cross State Air Pollution Rule (CSAPR) (76 FR 48208 (August 8, 2011)). However, EPA notes that the EPA CSAPR modeling was conducted to determine contribution to nonattainment or interference with maintenance for the 1997 ozone NAAQS and the 1997 and 2006 fine particulate matter (PM_{2.5}) NAAQS. Delaware’s SIP revision did not include any information supporting “contribution to violation” for the 2008 ozone NAAQS to meet requirements in section 173(c)(1) that emission offsets come from an area which contributes to violation of the NAAQS where the source seeking a permit is located.

section 173(c)(1) that emission offsets must be from areas in the same or higher attainment classification for a NAAQS. Therefore, Delaware's regulation does not meet the requirements in CAA 173(c)(1) or its implementing regulations in 40 CFR 51.165 and in appendix S as Delaware lacks authority to designate areas "nonattainment" for emission offset requirements.

Thus, because Delaware's revised regulation 7 DE Admin. Code 1125, sections 2.5.5 and 2.5.6 does not comply with requirements in CAA section 172(c)(5) and 173(c)(1) and the implementing regulations in 40 CFR 51.165 and appendix S, EPA finds the revision does not meet CAA requirements in the statute or in its implementing regulations. In addition, Delaware's revision to 7 DE Admin. Code 1125, section 2.5.5 inappropriately allows Delaware to treat areas as nonattainment for emission offset requirements when only EPA possesses such authority under the CAA to designate areas nonattainment, and thus EPA additionally finds the revision does not meet requirements in the CAA. Therefore, EPA proposes to disapprove the October 15, 2013 SIP revision.

III. Proposed Action

Pursuant to CAA section 110(k)(3), EPA is proposing to disapprove Delaware's October 15, 2013 SIP revision related to nonattainment NSR preconstruction permit program requirements for emission offsets. Specifically, Delaware's October 15, 2013 proposed SIP revision seeks to expand the geographical area in which owners and operators of new or modified major stationary sources may obtain emissions offsets, regardless of the area's attainment classification for the ozone NAAQS and without specific requirements that the area "contribute to violation" of the ozone NAAQS in the area in which a new or modified source is locating or located. EPA

proposes to disapprove this SIP revision for two reasons: (1) Delaware's proposed emissions offset provision language does not comport with the specific requirements under CAA sections 172(c)(5) and 173(c)(1) or the Federal implementing regulations in 40 CFR 51.165 and appendix S; and (2) Delaware lacks legal authority to designate an area as nonattainment under CAA section 107(c) and (d).

Under CAA section 179(a)(2), final disapproval pursuant to CAA section 110(k) of a submission that addresses a requirement of a Part D Plan (CAA sections 171-193), starts a sanction clock. While Delaware's SIP revision addresses the Part D Plan requirement for a NSR permitting program, Delaware presently has a fully-approved NSR permit program. *See* 77 FR 60053. Thus, there is no deficiency in Delaware's SIP. Therefore, if EPA takes final action to disapprove this SIP submission, no sanctions under CAA section 179 will be triggered.

The full or partial disapproval of a SIP revision in general also triggers the requirement under CAA section 110(c) that EPA promulgate a FIP no later than two years from the date of the disapproval unless the State corrects the deficiency, and the Administrator approves the plan or plan revision before the Administrator promulgates such FIP. As previously discussed, Delaware's SIP is not deficient as Delaware has a fully-approved NSR preconstruction permit program. Therefore, if EPA takes final action to disapprove this submission, no FIP requirements for EPA under CAA section 110(c) will be triggered.

EPA is soliciting public comments only on the issues discussed in this document. These comments will be considered before taking final action. Sources in Delaware are reminded that

they remain subject to the requirements of Delaware's Federally-approved nonattainment NSR preconstruction permit program in 7 DE Admin. Code 1125 (approved by EPA on October 2, 2012) and are subject to potential enforcement for violations of the SIP including failure to comply with NSR permit requirements and specifically with emission offset requirements in CAA section 173 and in the Federally-enforceable Delaware SIP. *See* EPA's Revised Guidance on Enforcement During Pending SIP Revisions (March 1, 1991).

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. In this case, EPA is proposing to disapprove Delaware's October 15, 2013 SIP submittal because it does not meet Federal requirements. For that reason, this proposed action:

- is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);

- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed rule, to disapprove Delaware's October 15, 2013 SIP revision related to emission offset provisions, does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Volatile organic compounds.

Authority: 42 U.S.C. 7401 et seq.

Dated: May 13, 2015.

Shawn M. Garvin,
Regional Administrator,
Region III.

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